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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/774,275	01/30/2001	Aaron Strand	8362-CIP-DIV	2989

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EXAMINER	
PASCUA, JES F	

ART UNIT	PAPER NUMBER
3727	

DATE MAILED: 04/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/774,275	STRAND ET AL.	
	Examiner	Art Unit	
	Jes F. Pascua	3727	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *14 March 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *75-116 and 138-153* is/are pending in the application.

4a) Of the above claim(s) *79,80,99,100,116 and 144* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *75-78,81-98,101-115,138-143 and 145-153* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Amended claim 116 does not require the two areas of structural weakness of the elected embodiment. New claim 144 recites a peel seal, which is directed to a non-elected embodiment. Claims 116 and 144 remain withdrawn from consideration.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 86-88 and 106-108 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The specification fails to provide an adequate written description of the areas of structural weakness nonlinearly extending across a width dimension or a length dimension.

Applicant's remarks have been considered. However, before the Examiner can remove the rejection, it is respectfully requested applicant specifically indicate where in the written specification the "areas of structural weakness nonlinearly extending across a width dimension or a length dimension" are discussed in manner that would enable

one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 138-141, 143, 145, 147 and 152 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611 (both previously cited).

Lingenfelter discloses the claimed device except for each of the front and rear panels 19, 21 having an area of structural weakness. Plourde '611 discloses that it is known in the art to provide an area of structural weakness 40 in the front and rear panels of an analogous bag. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the front and rear panels of Lingenfelter with the areas of structural weakness of Plourde '611, in order to provide a wider access opening to the interior of the bag.

6. Claims 78 and 98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the skirt web material being coupled to the reclosable fastener structure instead of being integral therewith. It would have been obvious to one having ordinary skill in the art at the time the invention was made to couple the skirt web material to the reclosable fastener structure in Lingenfelter, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. *Nerwin v. Erlichman*, 168 USPQ 177, 179.

7. Claims 86-88 and 106-108 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the areas of structural weakness nonlinearly extending across a width dimension or a length dimension. It would have been an obvious matter of design choice to make the areas of structural weakness of Plourde '611 extends nonlinearly across a width dimension or a length dimension. A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47.

8. Claims 91, 92, 111, 112, 148 and 149 rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter, Plourde '611 and admitted prior art.

Lingenfelter and Plourde '611 disclose the claimed invention except for the areas of structural weakness comprising microperforations or scoring instead of perforations.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to replace the perforations of Plourde '611 with microperforations or scoring in order to facilitate the tearing of the Lingenfelter bag material would be within the level of ordinary skill in the art. Applicant's lack of remarks, filed 03/14/2005, regarding the Examiner's Official Notice in the 09/10/2004 Office action is considered an admission of prior art.

9. Claims 93-95, 113-115 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611 as applied to claims 75, 96 and 138, and in further view of Peppiatt '143.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the material forming the bag comprising a laminate film. Peppiatt '143 teaches that it is known in the art form an analogous bag from a multiple laminate film. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use multiple laminate film to form the bag of Lingenfelter, taught to be desirable by Peppiatt '143, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

10. Claim 142 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for areas of structural weakness comprising a hermetic seal. It would have been obvious to one having ordinary skill in the art at the time the invention was made to hermetically seal the areas of structural weakness in Plourde '611 since it was known in the art that hermetically sealed areas of structural weakness in bags prevents spoiling of the bag contents while facilitating the initial opening of the bag.

11. Claim 150 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for at least one area of structural weakness having at least one tear tape. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide at least one structural area of weakness of Plourde '611 with a tear tape since it was known in the art that tear tapes facilitate the tearing of a bag along the area of structural weakness.

12. Claim 151 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for the opposite ends of the areas of structural weakness having notches. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide notches at opposite ends of the areas of structural weakness in Plourde '611

since it was known in the art that notches at opposite ends of the areas of structural weakness facilitate the initiation of tearing along the areas of structural weakness.

13. Claim 153 rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for the reclosable fastener having slider. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the reclosable fastener of Lingenfelter with a slider since it was known in the art that sliders facilitate the opening and closing of reclosable fasteners.

Response to Arguments

14. Applicant's arguments filed 03/14/2005 have been fully considered but they are not persuasive.

In response to applicant's argument that there is no suggestion to combine the references, the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Plourde discloses "perforations 40, so that access to the interior of the bags 16 through what will

eventually be their tops or mouths may be had." The Examiner disagrees with applicant's remark that there is no difference in the width of the opening to the bag of Lingenfelter when combined with Plourde. The difference in the width of the opening would be measured by the amount of bag material removed between the two lines of perforations, taught by Plourde, as compared to no bag material removed by the single line of perforations of Lingenfelter.

In response to applicant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant's remark that the 09/10/2004 Office action "involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde reference" is inaccurate and any of applicant's remarks based on this misinterpretation of the 09/10/2004 Office action fail. As a note, the Examiner respectfully requests applicant provide evidence in applicant's specification that an "arc", like that of Plourde, cannot be construed as a fold; especially since Plourde discloses the tubular sheet material 10 as being flattened (col. 4, lines 21-25).

Applicant argues that neither Lingenfelter nor Plourde meet the recitation of the distal margins of the skirt structure be coupled to the web material forming the bag material. To the degree that the claims explicitly recite the distal margins of the skirt structure being *directly* coupled to the web material forming the bag, the distal margins of the skirt structure in Lingenfelter and Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting applicant's claims.

In response to applicant's argument that Plourde is inconsistent with Lingenfelter, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). Applicant's reliance on the "offset" nature of Plourde's seals to argue that the limitations are not taught in the cited art is confusing, since Lingenfelter clearly shows the distal margins of the skirt structure being coupled to the web material at corresponding locations as claimed and nowhere in the 09/10/2004 Office action was it suggested coupling distal margins of the skirt structure of Lingenfelter to the web material in a manner shown by Plourde. Applicant appears to, again, misinterpret the Office action.

Finally, applicant's limited remarks in support for patentability of the subject matter rejected in paragraphs 9-16 of the 09/10/2004 Office action (now paragraphs 6-13 in the present Office action) is considered to be an admission of prior art.

Conclusion

15. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jes F. Pascua whose telephone number is 571-272-4546. The examiner can normally be reached on Mon.-Thurs..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W. Young can be reached on 571-272-4549. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jes F. Pascua
Primary Examiner
Art Unit 3727

JFP